In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 671

BIBB COUNTY BOARD OF EDUCATION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court entered on May 18, 1967, be affirmed.

OPINIONS BELOW

The opinion of the three-judge district court is incorporated in the decree from which this appeal is taken (J.S. A15–32) and is not reported. The present decree was entered on further proceedings in the case of *Lee, et al.* v. *Macon County Board of Education, et al.*, reported at 267 F. Supp. 458, from which an appeal has been docketed in this Court as No. 489 *sub nom. Wallace et al.* v. *Lee, et al., and United*

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States of America. Prior opinions in No. 489 are reported at 231 F. Supp. 743 and at 221 F. Supp. 297.

JURISDICTION

The judgment of the three-judge district court (J.S. A15–32) was entered May 18, 1967. A notice of appeal was filed on June 17, 1967. The time for filing the Jurisdictional Statement was extended by the district court to September 30, 1967, and it was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.[1]

QUESTION PRESENTED

Whether the district court properly joined the appellants as parties defendant and required them to adopt for the Bibb County School System the desegregation plan attached to the district court order of May 18, 1967.

STATEMENT

The Procedural History. On March 22, 1967, the court below rendered its decision in *Lee, et al.* v. *Macon County Board of Education, et al.* (referred

[1] An action seeking the desegregation of a single school district is not of such a nature as to require the convening of a three-judge court. See *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 336 (E.D. La.), leave to file petition for mandamus denied, 351 U.S. 948. The decree from which this appeal was taken was not, however, the result of such an action. This is, rather, a further proceeding in the main case (No. 489), seeking to enforce the three-judge court's original order in that case. We therefore believe that this appeal properly falls within this Court's jurisdiction as conferred by 28 U.S.C. § 1253. Cf. *Bush* v. *Orleans Parish School Board*, 190 F. Supp. 861, 191 F. Supp. 871, 194 F. Supp. 182 (E.D. La.), affirmed, 366 U.S. 212, 367 U.S. 908, 368 U.S. 339.

to hereinafter as the "main case"), which is presently on appeal in this Court in No. 489, *sub nom. Wallace, et al. v. Lee, et al. and United States of America*, stay denied, 387 U.S. 916. After the entry of this decree, the State Superintendent of Education notified each of the 99 Alabama school systems named in that decree, including the appellants herein, that they were required to adopt a desegregation plan meeting the standards set forth in a model plan attached to the court's decree (J.S. in No. 489, A2–A10). By report dated April 17, 1967 (see J.S. in No. 489, A172–A174), the State Superintendent submitted to the district court desegregation plans for each of the 99 systems with the exception of Bibb County.

On April 24, 1967, on the motion of the United States, the district court entered an order adding several parties, including the appellants herein, as defendants in the main case and directing the added defendants to show cause why they should not be required to adopt a desegregation plan conforming to the court's model plan (J.S. in No. 489, A175–A179). At the hearing on May 13, 1967, the Bibb County Board of Education filed objections (J.S. A33–35), which were overruled. The court received evidence, heard argument of counsel and subsequently entered the order of May 18, 1967, from which this appeal was taken.

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[2] The procedural history of the litigation in the main case is set forth in the United States' Motion to Affirm in No. 489 at pp. 2–8 and is not repeated here. We are serving upon the appellants our Motion to Affirm in No. 489.

The District Court's Decision. The district court found that Bibb County had failed to respond affirmatively to the order to show cause other than by filing the objections to the court's jurisdiction. Certain questionnaires directed to the students and teachers in Bibb County constituted the only implementation of a plan of desegregation (R. 1464). The court found that the deposition of the superintendent of schools of Bibb County[1] established that the county operated a dual school system based on race, with racially segregated schools, student bodies and faculties, and separate bus transportation systems for Negro and white students. The court observed: "The Board has failed to adopt any plan for the assignment of students on a non-racial basis meeting the requirements of this Court's order of March 22, 1967, nor has it adopted any plan or taken any effective steps for the desegregation of the faculty or staff of the schools nor for the desegregation of the transportation systems. Counsel for the Board does not dispute these facts" (J.S. A18). Upon these findings, the district court ordered the appellants to adopt the desegregation plan attached to the court's order and fully to carry out the plan (J.S. A19).

[1] Since the superintendent was not available due to sickness, the court properly received his deposition in evidence. Rule 25(d)(3), F.R. Civ. P. The deposition had already been introduced in evidence in the main cause and was reoffered as competent evidence in this proceeding. Upon inquiry of the court, the appellants' counsel declined to offer any evidence in response to the show cause order (R. 1454–1455) and declined to answer the court's question whether there was any dispute that Bibb County operated a dual school system (R. 1456–1457; 1462–1463).

The desegregation plan in question is the plan challenged on the appeal in No. 489 (fully described in our Motion to Affirm therein at pp. 7–8) and it is essentially the same as the plan adopted by the Fifth Circuit in *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836, decision on rehearing *en banc* at 380 F. 2d 385, certiorari denied, October 9, 1967 (Nos. 256, 282 and 301).

ARGUMENT

The appellants complain of the procedure followed by the court. We submit, however, that the court's action here was an appropriate means of effectuating its earlier decree directing State officials to use their offices to achieve State-wide school desegregation. To be sure, the court might have entered an order enjoining the State from continuing any financial aid or other assistance to non-complying districts. But there can hardly be complaint because the court avoided that harsh course and, instead, adopted the procedure of joining noncomplying districts on an individual basis and affording each of them an opportunity for an evidentiary hearing before ordering compliance with the model desegregation plan.[4]

[4] Notice of the procedure to be followed was given by the court in its March 22, 1967, opinion in the main case (267 F. Supp. at 479): "in some instances a particular school district will need to be brought directly into the litigation to insure that the defendant State officials have implemented this Court's decree and that the state is not supporting, financially or otherwise, a local system that is being operated on an unconstitutional basis."

The objections of improper joinder and lack of venue are without merit. The basis of the district court's action in No. 489 was the existence of a State-wide policy to discourage desegregation. In that circumstance it was entirely proper under the "series of transactions or occurrences" clause of Rule 20(a) of the Federal Rules of Civil Procedure to join both State-wide and local officials. *United States* v. *Mississippi*, 380 U.S. 128, 141–43. And, for the same reason, as *United States* v. *Mississippi* holds (380 U.S. at 142–143), the venue objection must fall. See 28 U.S.C. § 1392(a). Of course, the district court clearly had personal jurisdiction over the defendants. F.R. Civ. P., Rule 4(f).

In conclusion, we emphasize that no school system has been directly ordered to adopt a desegregation plan without first being joined as a party and given an opportunity to be heard.[5] Such hearings have not been mere formalities. Three other school systems added as parties defendant contemporaneously with the appellants were dropped by the district court's order of May 18, 1967, upon a showing that they were in substantial compliance with the obligation to desegregate. By contrast, these appellants have

[5] Upon the United States' motion to add parties and for an order to show cause, the district court directed that appellants be served with copies of the motion and the order adding the appellants as parties. The court further directed the clerk to make available copies of all pleadings, orders or decrees in the case (J.S. in No. 480, A179). Against this background, the appellants cannot now complain that the pleadings did not make out a charge against the Board and did not state a claim upon which relief could be granted. See F.R. Civ. P., Rule 8.

apparently taken no steps to obey the constitutional mandate or the order of the State Superintendent. Nor have they offered a defense. In the circumstances, the district court was fully warranted in entering the desegregation decree appealed from.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted.

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OCTOBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967